Supreme Court, U.S.
FILED
07-873 DEC 28 2007
OFFICE OF THE CLERK

No. 07-___

IN THE

Supreme Court of the United States

ROBERTO DELGADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

MICHAEL SALNICK, ESQ. *
SALNICK, FUCHS, & BERTISCH, P.A.
One Clearlake Centre, Ste 1203
250 S. Australian Avenue
West Palm Beach, FL 33401
(561) 471-1000

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred in denying petitioner's request for a jury instruction for simple possession (a lesser included offense)? Whether the appellate court erred in finding this issue waived?
2. Whether the trial court erred in finding that the Petitioner possessed the firearm in furtherance of drug trafficking? Whether the appellate court erred in finding it sufficient that the firearm had the potential for facilitating drug trafficking?
3. Whether the trial court imposed a reasonable sentence upon Petitioner?

CORPORATE DISCLOSURE STATEMENT

R. Alexander Acosta, Esq. - US Attorney for the Southern District of Florida

Flynn Bertisch, Esq. - assistant defense trial & sentencing counsel

Dave Lee Brannon, Esq. - Assistant Federal Public Defender

Roberto Delgado - Defendant/Petitioner

Phillip DiRosa - Assistant US Attorney

Hon. James M. Hopkins - magistrate judge

Hon. Daniel T.K. Hurley - trial court & sentencing judge

Hon. Linnea R. Johnson - magistrate judge

Shaniek Mills Maynard - Assistant US Attorney

John C. McMillan, Jr., Esq. - Assistant United States Attorney

Jeanne Marie Mullenhoff - Assistant US Attorney

Palm Beach County Sheriff's Office - Arresting agency

Michael Salnick, Esq. - Trial defense counsel & appellate counsel

Salnick, Fuchs & Bertisch, P.A. - Law Firm representing appellant

Anne R. Schultz, Esq. - Assistant United States Attorney, Appellate Division

Hon. Edwin G. Torres - magistrate judge

Hon. Ann E. Vitunac - magistrate judge

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
CITATION OF CASE BELOW	1
BASIS FOR JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE SETTING FORTH MATERIAL FACTS	2
ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT	4
I. FIREARM IN FURTHERANCE OF DRUG TRAFFICKING	4
II. LESSER INCLUDED JURY INSTRUCTION REQUEST	6
III. REASONABLENESS OF THE SENTENCE	12
CONCLUSION	17
APPENDIX A—Opinion Below	1a
APPENDIX B—Judgment of District Court	5a

TABLE OF AUTHORITIES

CASES	Page
Bailey v. United States, 516 U.S. 137 (1995)	5
Carter v. United States, 530 US 255 (2000)	7
Gall v. United States, No. 06-794, 2007 WL 4292116 (U.S. December 10, 2007)	17
Keeble v. United States, 412 U.S. 205 (1973)	7
Martin v. Ohio, 480 U.S. 228 (1987)	9
Sandstrom v. Montana, 442 U.S. 510 (1979)	9
Schmuck v. United States, 489 U.S. 705 (1989)	7
Smith v. United States, 508 U.S. 223 (1993)	4
United States v. Biheiri, 356 F. Supp. 2d 589 (E.D. Va. 2005)	16
United States v. Booker, 543 U.S. 220 (2005)	16
United States v. Carty, 462 F.3d 1066 (9th Cir. 2006)	15
United States v. Catchings, 922 F.2d 777 (11th Cir. 1991)	7
United States v. Cull, 446 F. Supp. 2d 961 (E.D. WI 2006)	16
United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002)	12
United States v. Ellis, 168 F.3d 558 (1st Cir. 1999)	12
United States v. Fells, 78 F.2d 168 (5th Cir. 1996)	13
United States v. Finley, 245 F.3d 199 (2d Cir. 2001)	4

TABLE OF AUTHORITIES—Continued

	Page
United States v. Fulford, 267 F.3d 1241 (11th Cir. 2001)	9
United States v. Gauvin, 173 F.3d 798 (10th Cir. 1999)	13
United States v. Jaber, 362 F. Supp. 2d 365 (D. Mass. 2005)	16
United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005)	12
United States v. Lively, 803 F.2d 1124 (11th Cir. 1986)	9
United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998)	13
United States v. Moreland, 366 F. Supp. 2d 416 (S.D. W. Va. 2005)	16
United States v. Rojas-Flores, 384 F.3d 775 (9th Cir. 2004)	12
United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1999)	13
United States v. Silvestri, 409 F.3d 1311 (11th Cir.)	11
United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992)	9
United States v. Stickel, 176 Fed. Appx. 47 (11th Cir. 2006)	8, 9
United States v. Tatum, 194 Fed. Appx. 810 (11th Cir. 2006)	10
United States v. Timmons, 283 F.3d 1246 (11th Cir. 2002)	4, 5, 8
United States v. Williams, 438 F.3d 1272 (11th Cir. 2006)	14
United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006)	15

IN THE

Supreme Court of the United States

No. 07-__

ROBERTO DELGADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

CITATION OF CASE BELOW

The opinion of the court of appeals is unreported, but may be found at *Delgado v. United States*, 2007 WL 2859806 (11th Cir. Oct. 3, 2007). The opinion is attached in appendix. The sentencing order with judgment and sentence is unreported, but is attached in appendix.

BASIS FOR JURISDICTION

The court of appeals entered its judgment on October 2, 2007. A petition for rehearing was denied on November 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 USC § 922

18 USC § 924

18 USC § 3553

21 USC § 841

21 USC § 844

Rule 31(c) of the Federal Rules of Criminal Procedure

Section 3E1.1 of the U.S.S.G.

Section 4A1.3(b)(1) of the U.S.S.G.

STATEMENT OF THE CASE SETTING FORTH MATERIAL FACTS

Petitioner Roberto Delgado is incarcerated on this case and is serving a thirty (30) year sentence. Mr. Delgado was convicted by a jury of count 1 possession of a firearm by a convicted felon (in violation of 18 U.S.C. §922(g)(1)); count 2 possession of cocaine with intent to distribute (in violation of 21 U.S.C. §841(a)(1)); and count 3 carrying a firearm during and in relation to a drug trafficking crime (in violation of 18 U.S.C. §924(c)(1)(A)(i)) (Doc 81 - pg 1). The district court fashioned a prison term of 30 years by imposing 10 years for count 1 and 15 years for count 2 and 5 years for count 3; all sentences to be served consecutively (Doc 90 - pgs 1-3). At sentencing, the district court determined that Petitioner was a career offender due to two state felony convictions approximately 10 years prior to the instant offense. The district court also refused to award Petitioner the reduction for acceptance of responsibility because Mr.

Delgado exercised his constitutional right for a jury trial.

Robert Delgado was arrested after a vehicle stop by a Palm Beach County, Florida Sheriff's deputy. The deputy testified that he effectuated the stop due to the vehicle's dark tinted windows and a burnt out tag light (R1-95-10). The deputy sheriff ordered Mr. Delgado out of his car (R1-95-18) and to the back of the vehicle, and when Mr. Delgado stepped out of his vehicle upon command, the deputy observed a firearm in appellant's rear waistband (R1-95-49). After a search of the vehicle, cocaine, was found; the cocaine weighed approximately 28.5 grams.

At trial, Mr. Delgado stipulated that he was a convicted felon and did not dispute that he indeed possessed the cocaine and gun. Mr. Delgado only disputed the government's allegations that he intended to distribute the cocaine or that he carried the gun to facilitate drug trafficking. The trial court subsequently denied the defense's request for a jury instruction for the lesser included offense of possession of cocaine, finding that the issue was not disputed by defense evidence. At the conclusion of the government's case, defense counsel moved for a judgment of acquittal (JOA), on counts 2 and 3, arguing that there was insufficient evidence of any intent to distribute the cocaine and that there was no evidence of the firearm being carried in relation to any drug trafficking (R3-97-329).

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

I. FIREARM IN FURTHERANCE OF DRUG TRAFFICKING

To be guilty of violating section 924(c)(1)(A), a person must use or carry a firearm "during and in relation to" any crime of violence or drug trafficking crime or possess the firearm "in furtherance of the crime." *See* 18 U.S.C. §924(c)("any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm"). The phrase "during and in relation to" is a limiting phrase to narrow an offender's conduct to exclude the possibility that at the time of the drug trafficking, the offender possessed or carried the firearm by coincidence. *See United States v. Timmons*, 283 F.3d 1246, 1251 (11th Cir. 2002)(a conviction under §924(c) requires that the prosecution establish that the firearm helped, furthered, promoted, or advanced the drug trafficking); *see also Smith v. United States*, 508 U.S. 223, 237 (1993)(phrase "in relation to" requires that the firearm must have some purpose or effect with respect to the drug trafficking crime). The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for the charge; rather, the government must demonstrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity. *See United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001) (there must be a showing of some nexus between the firearm and the drug operation).

However, in this case at trial, the government did not demonstrate that the firearm on Mr. Delgado's person advanced or promoted or in any way facilitated his alleged drug trafficking. · Therefore, the mere presence of a gun within the defendant's dominion and control following a stop in the manner described is not sufficient by itself to sustain a section 924(c) conviction. The district court clearly erred in denying the defense motion for a judgment of acquittal on this charge where there merely an allegation that the firearm had the potential for facilitating drug trafficking. Certainly, any firearm in the presence of any cocaine could have the potential for facilitating drug trafficking. Rather, the inert presence of a firearm, without more, is not enough to trigger §924(c)(1). *See Bailey v. United States*, 516 U.S. 137, 143 (1995) (to sustain a conviction under the §924(c)(1), the government must prove that the defendant actively employed the firearm during and in relation to the predicate crime); *but see United States v. Timmons*, 283 F.3d 1246, 1252 (11th Cir. 2002) (Congress amended §924(c)(1) after *Bailey* to include "possession in furtherance of" a drug trafficking crime).

In the instant case, the only evidence the government produced to show that Mr. Delgado possessed the firearm to further drug trafficking was a law enforcement officer's opinion that "drug dealers frequently carry a firearm to protect themselves, as well as their drugs and money." This evidence, with-out more, was legally insufficient to sustain this particular conviction. Therefore, Eleventh Circuit Court of Appeals departed from the essential requirements of the law in holding that the firearm on Delgado's person had the potential for facilitating drug trafficking without any other evidence.

II. LESSER INCLUDED JURY INSTRUCTION REQUEST

Petitioner Robert Delgado respectfully submits that the Eleventh Circuit Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Petitioner submits that the appellate court erred in dismissing as waived the error that the trial court made in denying his request for a jury instruction on a lesser included offense.

Before trial, defense counsel requested an instruction on the lesser included offense of possession of cocaine (from the charge of possession of cocaine with intent to distribute). The district court responded, "There is no question the defendant has a right to have an instruction on theory of defense, but it has to be a legitimate defense. . . . did Mr. Delgado . . . have intent to distribute, . . . Anything that is relevant to evaluating those facts is legitimate" (R2-96-108). However, at the charge conference, when defense counsel moved for the lesser offense jury instruction of possession of cocaine and argued that a defendant is entitled to an instruction on a lesser included offense if the evidence would provide for the jury to convict on the lesser (R3-97-368), the district court would not allow the jury to be instructed on the lesser offense (R3-97-371-72). The district court justified its denial by finding that the matter "has not been placed in dispute by the aducement of any evidence suggesting that this [amount of cocaine] was for personal use as opposed to being distributed to others." (R3-97-373). In contradiction to that ruling, after the defense counsel moved for a JOA, the trial court stated, "I realize there is a debate and raised by the questions about whether there is enough evidence

to establish the crime of possession of cocaine with intent to distribute. The Government has adduced evidence it came in the form of the opinion testimony" (R3- 97- 333).

Rule 31(c) of the Federal Rules of Criminal Procedure provides that a defendant may be found guilty of "an offense necessarily included in the offense charged." An offense is a necessarily included offense of another if the elements of the lesser offense are a subset of the elements of the charged offense. *See Carter v. United States,* 530 US 255, 261 (2000)(citing *Schmuck v. United States*, 489 U.S. 705, 711 (1989)).

In this case, Mr. Delgado was charged with violating 21 U.S.C. section 841(a)(1), which prohibits a person from knowingly or intentionally manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance. Simple possession of cocaine under 21 U.S.C. section 844 prohibits a person from knowingly or intentionally possessing cocaine (a schedule II controlled substance). Therefore, the lesser offense of possession of cocaine is subsumed by the greater offense of possession of cocaine with intent to distribute because one cannot commit the greater offense without committing the lesser.

It is well-settled that a criminal defendant is entitled to the lesser-included offense instruction if the evidence would permit a rational jury to find him guilty of the lesser offense and not the greater. *United States v. Catchings*, 922 F.2d 777, 780 (11th Cir. 1991)(citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)). While in Mr. Delgado's case there was evidence of possessing a scale and plastic baggies, there was no direct evidence on whether Delgado intended to distribute the cocaine. Further-

more, the jury would have been free to reject this option; however, the district court erred in refusing to give this option to the jury.

In Delgado's trial, the prosecution did not offer the arresting officer as an expert on drug trafficking or as qualified to give an opinion as to a defendant's intent regarding narcotics. It was only upon redirect examination that the arresting officer made a general statement: "Whenever I stop somebody and they claim it is for personal use, I normally find one baggy in their car, not 30, 40 baggies, and normally, you find maybe half a gram, if that, maybe a gram sometimes, but nothing significant over 20 grams or so" (R3-97235). Defense counsel previously had objected to the arresting officer testifying about the money being consistent with a drug dealer on the ground of lack of foundation (R2-96-162, 164). The prosecution also offered evidence from Duane Fernandez, a Delray Beach, Florida police officer, that in his expert opinion, the street value amount of cocaine would have been inconsistent with a personal use quantity (R 3-97-245). This general testimony was insufficient to support the trial court's decision to deny the lesser included offense jury instruction. *See United States v. Timmons*, 283 F.3d 1246, 1253 (11th Cir. 2002) (government expert testimony about drug dealers was insufficient and better method is additional witnesses connecting defendant specifically to contraband).

A criminal defendant is entitled to have the jury be given instructions to the lesser included offense when there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. *United States v. Stickel*,

176 Fed. Appx. 47 (11th Cir. 2006)(quoting *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986).

The trial court denied the lesser included jury instruction by finding that the defense did not submit any evidence on this issue; however, this requirement from the district court impermissibly shifted the burden of proof to the criminal defendant. *See, e.g., Martin v. Ohio,* 480 U.S. 228, 233 (1987) (prosecution can shift burden on claim of self defense, but jury cannot be disallowed from considering self defense evidence for purposes of decided elements of the offense); *Sandstrom v. Montana,* 442 U.S. 510, 524 (1979)(jury instruction that had effect of placing burden on defendant to disprove he had requisite mental state violates due process); *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992) (a criminal defendant does not have to disprove or prove anything);

A district court's refusal to give a requested jury instruction is reviewed by the appellate court for abuse of discretion. *United States v. Stickel*, 176 Fed. Appx. 47 (11th Cir. 2006) (citing *United States v. Fulford,* 267 F.3d 1241, 1245 (11th Cir. 2001)). An appellate court should find reversible error if the requested instruction correctly stated the law; the actual charge to the jury did not substantially cover the proposed instruction; and, the failure to give the instruction substantially impaired the defendant's ability to prepare an effective defense. *Id.* In this case, the appellate court held that Petitioner waived this issue because it was not fully presented in his initial brief; rather, Petitioner fully discussed the issue in his reply brief in response to the prosecution's allegation that the issue was not fully briefed.

Petitioner argues that the Eleventh Circuit has denied him due process where the district court's failure to give the lesser included instruction to the jury severely impaired the defendant's sole theory of defense, and thus the failure of the appellate court to address this issue on appeal is tantamount to not allowing Petitioner to appeal. At trial, Mr. Delgado did not dispute that he possessed the cocaine, but rather, his only defense to the charge was that he did not intend to distribute the cocaine. That theory of defense was crucial to the defense of another count, possession of a firearm during a drug trafficking offense, where appellant would not have been found guilty of that count if the jury returned a verdict for the lesser included offense of simple possession.

The only disputed factual element in the trial was the element of intent to distribute, and therefore, it was error to fail to give the lesser included offense instruction. *See United States v. Tatum*, 194 Fed. Appx. 810 (11th Cir. 2006) (a lesser-included instruction is should be given when the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense). At trial, there was evidence that Mr. Delgado personally used cocaine and that appellant had just been released from an inpatient facility to treat that addiction. The arresting officer testified that Delgado was not acting normally and was sweating profusely; both of those descriptions would indicate that Delgado had recently ingested cocaine. The district court's failure to give the requested jury instruction on the lesser included offense of possession deprived Mr. Delgado of his ability to properly defend his case. The appellate court's failure to address this issue further deprived Mr. Delgado of the most basic due process. The

Eleventh Circuit held Mr. Delgado waived this issue because he failed to raise it in his initial brief. For support of this assertion, this Honorable Court cited to *United States v. Silvestri,* 409 F.3d 1311, 1338 n. 18 (11th Cir.), *cert. denied*, 546 U.S. 1048 (2005), in which the appellant failed to raise an issue at all and later attempted for the first time, in a Notice of Supplemental Authority, to raise a new issue.

In the case at bar, Mr. Delgado made a brief mention of the issue in his initial brief under issue two, but concedes that there was no further expansion of this particular argument in the brief. In the government's Answer Brief, this issue regarding the lesser—included charge of simple possession was acknowledged on page 29, but dismissed by the government, alleging that it would not respond to this issue because it was not properly briefed (AB at p. 30). However, the government in its answer brief, not only acknowledged that issue was raised (albeit alleged as insufficiently raised), but also acknowledged that this issue was raised in Mr. Delgado's motions for judgment of acquittal (AB at p. 30 n. 18). Additionally, Mr. Delgado raised this specific issue in his motion for a new trial in issue b (Appendix 3 p 2) as well briefing it fully in his memorandum of law (Appendix 3 pgs. 3-7) (DE 85 pgs. 3 -7) to the district court.

Mr. Delgado argues that because the government in its answer brief acknowledged the issue, it had full opportunity to address same and voluntarily chose not to; rather, it chose to allege that the matter was insufficiently briefed. After the allegation that the simple possession issue was not sufficiently briefed in the government's Answer Brief, the matter was fully briefed in the Reply Brief. The government did not

file a motion requesting the Court's permission to file a response to the reply brief.

III. REASONABLENESS OF THE SENTENCE.

The district court determined that the total offense level was 37 and that the criminal history was category 6. A district court's interpretation of the Guidelines is reviewed de novo but an appellate court must accept the district court's factual findings unless clearly erroneous. *United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir. 2005).

Section 3E1.1 of the U.S.S.G. provides for a two point decrease in the offense level if the defendant clearly demonstrates acceptance of responsibility for his offense. A third point may be deducted if the defendant accepts responsibility in a timely manner and the offense level is 16 or greater. Application note 2 specifically states that the "adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."

Conversely, a defendant is still able to demonstrate an acceptance of responsibility if he goes to trial to assert and preserve issues that do not relate to factual guilt, such as making a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct. *See, e.g., United States v. Rojas-Flores,* 384 F.3d 775 (9th Cir. 2004)(error to deny reduction where defendant went to trial to challenge the applicability of the statute to his specific conduct); *United States v. Cortes,* 299 F.3d 1030 (9th Cir. 2002)(reconsideration of reduction where defendant contested government's showing of his intent at trial); *United States v. Ellis,* 168 F.3d 558

(1st Cir. 1999) (trial defenses related to intent may qualify for reduction); *United States v. Gauvin,* 173 F.3d 798 (10th Cir. 1999)(affirming reduction where defendant went to trial to dispute only his intent to use his car to injure the police); *United States v. Rodriguez*, 975 F.2d 999 (3d Cir. 1999) (reduction available where defendant went to trial to contest only the gun count and the quantity of narcotics involved); *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998)(error to deny reduction where defendant at trial testified that he thought he killed a wild dog and not a wolf); *United States v. Fells*, 78 F.2d 168, 172 (5th Cir. 1996) (error to deny reduction where defendant admitted all the facts at trial but challenged their legal interpretation).

In the instant case, the trial court refused to award the two point reduction, finding that Mr. Delgado was not entitled to the reduction because he went to trial and required the government to prove every element of its case (R1- 99- 48). The trial court noted that Mr. Delgado litigated the case "very carefully and properly" including a pretrial evidentiary hearing on a motion to suppress evidence, and therefore, should not be awarded an acceptance of responsibility reduction (R1- 99- 48, 49).

However, the trial court failed to acknowledge that Roberto Delgado expressed his remorse and accepted responsibility for his conduct, and most importantly, at trial, Mr. Delgado stipulated that he was a convicted felon (R3-97-313), did not dispute that he possessed the firearm (R3- 97- 300), and did not dispute that he possessed the cocaine (R3-97-322). Mr. Delgado only disputed at trial that he possessed the cocaine with an intent to sell or that he possessed the

firearm in furtherance of the drug trafficking (R3-97-329).

While the district court has discretion to determine whether an acceptance of responsibility reduction is appropriate, the only reason the trial court gave in refusing to do so was that Delgado required the government to prove every element of the case (R1-99-48). The appellate court held that the district court did not clearly err in determining that Delgado was not entitled to a reduction for acceptance of responsibility because Delgado put the government to its burden of proof both before and during trial. This was a departure from the essential requirements of due process where it was undisputed that Mr. Delgado stipulated to the possession of the cocaine and the firearm and to being a convicted felon and only disputed his intent at trial.

Additionally, Mr. Delgado argues that his 360 month sentence was unreasonable where this length of incarceration exceeds his "culpability for this crime," especially where there is a dispute whether the guideline range was properly calculated. Section 4A1.3(b)(1) of the Guidelines provides for a downward departure in a defendant's criminal history category if the court finds that the defendant's criminal history category "substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." Petitioner contends that the district court's statement of reasons for its sentence was deficient under section 3553. The question of whether a district court complied with section 3553(c) is reviewed *de novo,* even if the defendant did not object below. *See United States v. Williams,* 438 F.3d 1272, 1274 (11th Cir. 2006).

At Oral Argument, the Eleventh Circuit had questioned the government regarding Mr. Delgado's sentence of 30 years in prison. There were inquiries about such a sentence where the Court noted the period of time between the instant offense and the other criminal convictions (over 10 years prior) as well as the progress Mr. Delgado had made regarding his family life, raising his children and employment. Mr. Delgado's cocaine addiction and voluntary recovery attempts were also raised.[1] Moreover, Mr. Delgado's civil counsel testified as to the accident resulting in his addiction. The trial court clearly had the authority, discretion, and the inherent ability to sentence the Roberto Delgado below the Advisory Guideline range. Such a sentence can place whatever weight the Court deems appropriate on any allegations of past criminal conduct. "Under the Advisory Guidelines, a sentencing court is free to consider any fact relevant to Section 3553(a). A court is not barred by the fact that a particular factor is discouraged or even forbidden by the Guidelines." *See United States vs. Zavala*, 443 F.3d 1165 (9th Cir. 2006). Moreover, no special weight is to be given to the Advisory Guidelines as opposed to the other factors mentioned in the above-referenced statute. While a District Court "must properly use the guideline calculation as advisory and start there, they must not accord it greater weight than any of the Section 3553 factors. The court must consider all information before it as done formerly, and then reach the correct sentence under all circumstances." *Zavala*, rehearing *en banc* granted by *United States vs. Carty*, 462 F.3d 1066 (9th Cir. 2006).

---

[1] This included Petitioner's voluntarily checking into a detox facility the month before his arrest.

Courts clearly do not put the Guidelines in any special priority above Section 3553(a) factors. *See United States vs. Cull*, 446 F. Supp. 2d 961 (E.D. WI 2006); *United States vs. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005); *United States vs. Moreland*, 366 F. Supp. 2d 416 (S.D. W. Va. 2005), and *United States vs. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2005) ["No individual factors singled out as having greater weight; instead, the richness of factual diversity in cases calls on some sentencing judges to consider all of the factors and to accord each factor the weight it deserves under the circumstances.]"

The district court imposed a thirty year prison sentence by stacking ten years for possession of a firearm by a convicted felon on top of a fifteen year sentence for possession of cocaine with intent to distribute on top of the **required** consecutive five year sentence for carrying a firearm in relation to drug trafficking. In considering the Petitioner's circumstances surrounding the instant offense, as well as his specific characteristics and the remoteness of the prior crimes, as required under section 3553, the 360 month sentence is clearly unreasonable and overly excessive: this sentence flies in the face of the *Booker* considerations where the guideline range is now only advisory and it can no longer dictate a defendant's sentence, but, instead, is supposed to be a mere sentencing factor that the district should consider along with the factors contained in section 3553(a). *See generally, United States v. Booker*, 543 U.S. 220, 259-60 (2005). Petitioner would submit that both the District Court and Court of Appeal failed to adequately consider the section 3553(a) factors. Petitioner was evidently drug addicted at the time of the offense as de-

scribed by the officer who initially stopped him.[2] It had been at least ten years since Petitioner's last conviction. The "rigid mathematical formulation" of the guidelines has been frowned upon. *See Gall v. United States,* No. 06-794, 2007 WL 4292116 (U.S. December 10, 2007). Both the trial and appellate court have seemingly overlooked that. A thirty-year sentence for twenty-eight grams of cocaine is hardly reasonable.

CONCLUSION

Petitioner Robert Delgado respectfully prays that this Honorable Court grant this petition for writ of certiorari to the Eleventh Circuit Court of Appeals on the grounds that his due process rights were violated. The lesser included offense of simple possession issue was central to Mr. Delgado's defense and intertwined with his motions for JOA and for a new trial in that the basis of all these arguments was the lack of evidence of intent to distribute. In this case, the government was sufficiently noticed regarding this issue where the defendant raised it during the trial both as a requested jury instruction and motion for judgment of acquittal as well as in his motion for a new trial. By the district court taking away this issue from the jury, the district court vitiated the only defense that petitioner had.

Petitioner also respectfully argues that the appellate court erred in using the standard that the firearm in this instance neither facilitated promoted or advanced a drug trafficking offense. The firearm found on Roberto Delgado was not an operative factor in relation to the predicate offense. It is well settled that the mere presence of a firearm in an area where

---

[2] He described him as sweating in his forehead area.

a criminal act occurs is insufficient and the government must demonstrate through specific facts that the firearm was possessed to advance or promote the criminal activity. The appellate court erred in not requiring a showing of some nexus between the firearm and drug trafficking.

Lastly, petitioner submits that a 30 year sentence for a relatively small amount of cocaine and a firearm is unreasonable, considering the factors set forth in section 3553 as applied to the nature of the crime with Mr. Delgado's history and characteristics as opposed to merely plugging in numbers to the sentencing guidelines.

Respectfully submitted,

MICHAEL SALNICK, ESQ. *
SALNICK, FUCHS, & BERTISCH, P.A.
One Clearlake Centre, Ste 1203
250 S. Australian Avenue
West Palm Beach, FL 33401
(561) 471-1000

* Counsel of Record *Counsel for Petitioner*

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 06-14458

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERTO DELGADO,
Defendant-Appellant.

Oct. 3, 2007

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 05-80193-CR-DTKH.

Before ANDERSON and PRYOR, *Circuit Judges*, and ALBRITTON, *District Judge*.

PER CURIAM:

Roberto Delgado appeals his convictions and sentence of 360 months of imprisonment for possession of a firearm and ammunition by a convicted felon, possession with intent to distribute cocaine, and carrying a firearm during and in relation to a drug trafficking crime. 18 U.S.C. §§ 922(g)(1) & 924(c)(1)(A)(I); 21 U.S.C. § 841(a)(1).Delgado argues that (1) there was no probable cause to support the traffic stop that

---

Honorable W. Harold Albritton, III, United States District Judge for the Middle District of Alabama, sitting by designation.

led to his arrest and the search of his vehicle; (2) there is insufficient evidence to support his conviction for carrying a firearm "during and in relation to" a drug trafficking crime; and (3) the court should have instructed the jury on the lesser included offense of simple possession of cocaine. Delgado also argues that the district court erred when it denied him a reduction for acceptance of responsibility, *see United States Sentencing Guidelines* § 3E1.1 (Nov. 2005), erroneously classified him as a career offender, *see id.* § 4A1.2, and imposed an unreasonable sentence. We discuss each argument in turn and affirm the convictions and sentence.

The arresting officer had probable cause to stop Delgado's car because he had reason to believe at least two traffic violations-illegal window tinting and unilluminated license tag-had occurred. *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). Because probable cause existed to stop the vehicle, the officer lawfully ordered Delgado out of the car, confiscated the firearm Delgado carried in plain view, investigated Delgado's driver's license, and performed a protective search of both driver and vehicle. *Ohio v. Robinette*, 519 U.S. 38-39, 117 S.Ct. 417, --- L.Ed.2d ---- - ---- (1996); *United States v. Purcell*, 236 F.3d 1274, 1277-78 (2001). The district court did not err when it denied Delgado's motion to suppress.

Delgado's argument that there is insufficient evidence to support his convictions for carrying a firearm "during and in relation to" a drug trafficking crime also fails. We review de novo the sufficiency of the evidence supporting a criminal conviction and view the evidence in the light most favorable to the government. *United States v. Diaz*, 248 F.3d 1065,

1084 (11th Cir.2001). The evidence suggested that the firearm at least had "the potential of facilitating" the drug trafficking offense because it was loaded, close to the cocaine, and readily accessible to Delgado. *United States v. Timmons*, 283 F.3d 1246, 1251 (11th Cir.2002).

Delgado argues for the first time in his reply brief that the district court erroneously denied his request for a jury instruction on the lesser included offense of simple possession of cocaine. "Under the law of this Circuit, an issue not raised in a party's initial appellate brief is considered waived, and the party is prohibited from raising the issue later in the appeal." *United States v. Silvestri*, 409 F.3d 1311, 1338 n. 18 (11th Cir.2005). As a result, Delgado waived this argument.

Delgado's arguments about sentencing also fail. We review the district court's interpretation of the Sentencing Guidelines de novo and its factual findings for clear error, *United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir.2005), and we review a sentence for reasonableness. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). First, the district court did not clearly err when it determined that Delgado was not entitled to a reduction for acceptance of responsibility because Delgado put the government to its burden of proof both before and during trial. U.S.S.G. § 3E1.1 cmt. n. 2; *see also United States v. Smith*, 127 F.3d 987, 989 (1997) (en banc).

Second, the district court was correct to classify Delgado as a career offender. According to section 4A 1.2 of the Guidelines, "[p]rior sentences imposed in unrelated cases are to be counted separately." U.S.S.G. § 4A1.2. The Guidelines Commentary states: "Prior sentences are not considered related if they

were for offenses that were separated by an intervening arrest. . . ." U.S.S.G. § 4A1.2 cmt. n. 3. Delgado was arrested for the first offense in January 1995 before he committed the second offense in April 1995, so the second offense was an intervening arrest. *United States v. Hunter*, 323 F.3d 1314, 1322-23 (11th Cir.2003). The district court was correct to conclude that the two prior sentences were unrelated and sentenced Delgado as a career offender.

Third, Delgado's sentence of 360 months of imprisonment was reasonable. The district court considered permissible sentencing factors, stated its reasons for the particular sentence on the record, and sentenced Delgado at the low end of the Guidelines range. *See Williams*, 456 F.3d 1353, 1361 (11th Cir.2006); *Talley*, 431 F.3d at 787-88. Delgado cannot establish that his sentence fails to further the sentencing purposes of section 3553(a).

Delgado's convictions and sentence, therefore, are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

[Filed Aug. 3, 2006]

Case Number: 9:05CR80193-001
USM Number: 75408-004

UNITED STATES OF AMERICA

v.

ROBERTO DELGADO

The defendant was found guilty of Counts 1, 2, and 3 of the Superseding Indictment on May 18, 2006. The defendant is adjudicated guilty of the following offenses:

Title/Section Number	Nature Of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Possession of a firearm and ammunition by a convicted felon.	July 18, 2005	1
21 U.S.C. § 841 (a)(1)	Possession with intent to distribute cocaine.	July 18, 2005	2
18 U.S.C. 924 (c)(1)(A)(I)	Carrying a firearm during and in relation to a drug trafficking crime.	July 18, 2005	3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
July 31, 2006

/s/ Daniel T. K. Hurley
DANIEL T. K. HURLEY
United States District Judge
August 2, 2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 360 months. This term of imprisonment consists of a term of 120 months as to Count 1 of the Superseding Indictment; 180 months as to Count 2 of the Superseding Indictment; and a term of 60 months as to Count 3 of the Superseding Indictment, to be served consecutively.

The Court makes the following recommendations to the Bureau of Prisons:

> The court recommend the defendant be permitted to participate in the drug / alcohol rehabilitation program; and the term of imprisonment be served at a facility in South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term of supervised release consists of a term of 3 years as to each of Counts 1, 2, and 3 of the superseding indictment, to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer,

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in an approved treatment program for mental health/substance abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$300.00	$	$

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A lump sum payment of $300.00 is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

No. 07-873

4-23-08

In the Supreme Court of the United States

ROBERTO DELGADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner forfeited his claim that the district court should have instructed the jury on simple possession of cocaine by not briefing that issue in his opening appellate brief.

2. Whether the evidence was sufficient to show that petitioner carried a firearm "in relation to" a drug trafficking offense.

3. Whether the district court clearly erred in denying petitioner a two-level reduction in his Sentencing Guidelines range for acceptance of responsibility under Sentencing Guidelines § 3E1.1.

4. Whether the sentence imposed by the district court was reasonable.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Archer v. *United States*, No. 07-8394 (Apr. 21, 2008) 13
Bailey v. *United States*, 516 U.S. 137 (1995) 10
Begay v. *United States*, No. 06-11543 (Apr. 16, 2008) 13
Cinel v. *Connick*, 15 F.3d 1338 (5th Cir.), cert. denied, 513 U.S. 868 (1994) 7
Gall v. *United States*, 128 S. Ct. 586 (2007) 13
Keeble v. *United States*, 412 U.S. 205 (1973) 8
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 7
Muscarello v. *United States*, 524 U.S. 125 (1998) 10
Schmuck v. *United States*, 489 U.S. 705 (1989) 8
Smith v. *United States*, 508 U.S. 223 (1993) 9
Thomas v. *Arn*, 474 U.S. 140 (1985) 7
United States v. *Barnhardt*, 93 F.3d 706 (10th Cir. 1996) 10
United States v. *Booker*, 543 U.S. 220 (2005) 14
United States v. *Elder*, 90 F.3d 1110 (6th Cir.), cert. denied, 519 U.S. 1016, and 519 U.S. 1131 (1996) 7
United States v. *Gibbs*, 182 F.3d 408 (6th Cir.), cert. denied, 528 U.S. 1051 (1999) 10

Cases—Continued: Page

United States v. *Harris*, 477 F.3d 241 (5th Cir.), cert. denied, 127 S. Ct. 2117 (2007) 10
United States v. *Hernandez*, 476 F.3d 791 (9th Cir.), cert. denied, 128 S. Ct. 265 (2007) 8
United States v. *Jackson*, 300 F.3d 740 (7th Cir. 2002) .. 10
United States v. *Levy*, 416 F.3d 1273 (11th Cir.), cert. denied, 546 U.S. 1011 (2005) 14
United States v. *Silvestri*, 409 F.3d 1311 (11th Cir.), cert. denied, 546 U.S. 1048 (2005) 5
United States v. *Smith*, 127 F.3d 987 (11th Cir. 1997) 6
United States v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) 9
United States v. *Timmons*, 283 F.3d 1246 (11th Cir.), cert. denied, 537 U.S. 1004 (2002) 6
United States v. *Upton*, 512 F.3d 394 (7th Cir.), petition for cert. pending, No. 07-10234 (filed Mar. 31, 2008) 8
United States v. *Williams*, 104 F.3d 213 (8th Cir. 1997) 10
United States v. *Zannino*, 895 F.2d 1 (1st Cir.), cert. denied, 494 U.S. 1082 (1990) 7
Watson v. *United States*, 128 S. Ct. 579 (2007) 10

Statutes and guidelines:

18 U.S.C. 922(g)(1) 2, 4
18 U.S.C. 924(a)(2) 2, 4
18 U.S.C. 924(c)(1) 9, 10
18 U.S.C. 924(c)(1)(A) 8, 9, 10
18 U.S.C. 924(c)(1)(A)(i) 2, 4
18 U.S.C. 1503 4

Statutes and guidelines—Continued: Page

18 U.S.C. 1623(a) 4
21 U.S.C. 841(a)(1) 2, 4
21 U.S.C. 841(b)(1)(C) (Supp. V 2005) 2, 4
21 U.S.C. 844 5
21 U.S.C. 844(a) 6
United States Sentencing Guidelines:
§ 3E1.1 11
§ 3E1.1 comment. (n.1(a)) 11
§ 3E1.1 comment. (n.2) 6, 11, 12
§ 3E1.1(a) 11
§ 4A1.2 comment. (n.2) 6
§ 4B1.2 13

In the Supreme Court of the United States

No. 07-873

ROBERTO DELGADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted in 250 Fed. Appx. 268.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2007. A petition for rehearing was denied on November 7, 2007. The petition for a writ of certiorari was filed on December 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing a firearm and ammunition after having previously been convicted of a felony, in

violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(C) (Supp. V 2005); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Pet. App. 7a-8a; 9:05-cr-80193-DTKH-1 Docket entry No. 29 (S.D. Fla. Feb. 23, 2006) (Superseding Indictment). The court of appeals affirmed. Pet. App. 1a-4a.

1. At about 9 p.m. on July 18, 2005, Deputy Daniel Morgado of the Palm Beach County Sheriff's Office observed a white Crown Victoria automobile exit a shopping plaza. 5/16/06 Tr. 136-140. The car's license-plate light was out and its windows were tinted a very dark color. *Id.* at 140-142. Deputy Morgado believed that the tinted windows were illegal because he could not see the driver of the automobile, or the driver's silhouette, through the windows. *Id.* at 141.[1]

Deputy Morgado activated the lights on his police car and stopped petitioner's vehicle. 5/16/06 Tr. 143-145. He approached the driver's side of the car and asked petitioner, who was the driver, for his license, registration, and proof of insurance. *Id.* at 146. Deputy Morgado repeated his document request several times before petitioner made any effort to comply, and petitioner produced his driver's license after several minutes. *Id.* at 146-147.

---

[1] A subsequent check of the car's windows with a tint meter confirmed that the windows were unlawfully tinted, and Deputy Morgado therefore issued a citation to petitioner for having an inoperative license-plate light and for having illegal window tint. 5/16/06 Tr. 152, 176-177.

During this time, Deputy Morgado observed that petitioner's hands were shaking, that he had sweat on his forehead, and that he was moving his hands around the seat cushions of the car. At that point, Deputy Morgado asked petitioner to exit the vehicle. 5/16/06 Tr. 151-154. After several requests, petitioner reluctantly got out of his car with his hands behind him, while trying to keep his back to the vehicle. *Id.* at 154-155, 204-205. Deputy Morgado directed petitioner to the back of the vehicle, and, as petitioner turned to walk away, Deputy Morgado observed the butt of a handgun in petitioner's waistband. *Id.* at 155-156. Deputy Morgado seized the gun, which was a loaded semi-automatic with a round in the chamber. *Id.* at 156-159. Petitioner claimed to have a permit for the gun. *Id.* at 156.

After verifying that petitioner did not have a permit to carry a weapon, Deputy Morgado arrested him. 5/16/06 Tr. 166. A search of petitioner incident to the arrest revealed a loaded magazine and $228 in small bills. *Id.* at 162-163. The cash was organized so that bills of the same denomination were folded together, a common practice among street-level drug dealers called a "dealer's fold." *Id.* at 164-166. Deputy Morgado also searched petitioner's vehicle and discovered, in the center console, a shopping bag that contained a digital scale with cocaine residue on it, approximately 33 small baggies containing cocaine, approximately 50 to 60 empty baggies, and a plastic container with a white powdery substance that was not cocaine. *Id.* at 167-176; 5/17/06 Tr. 245, 248. The total weight of the cocaine was approximately 28.5 grams. *Id.* at 268-271, 278. Petitioner's fingerprints were discovered on the digital scale and one of the baggies. *Id.* at 289-297.

2. On February 23, 2006, a federal grand jury in the Southern District of Florida returned a five-count superseding indictment against petitioner, charging him with possession of a firearm and ammunition after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(C) (Supp. V 2005) (Count 2); carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) (Count 3); making a false material statement to the district court, in violation of 18 U.S.C. 1623(a) (Count 4); and obstruction of justice, in violation of 18 U.S.C. 1503 (Count 5). Superseding Indictment 1-4.

On May 16, 2006, petitioner proceeded to trial on Counts 1 to 3 of the superseding indictment.[2] The government presented evidence that petitioner's conduct was consistent with an intent to distribute drugs, including the manner in which petitioner carried his money, the way the cocaine was packaged, the fact that petitioner was carrying a loaded gun, as well as his possession of a digital scale, an agent for cutting the drugs, and additional unused baggies. See 5/16/06 Tr. 136-177; 5/17/06 Tr. 235-236, 241-249. Government witnesses testified that the amount of the drugs (28.5 grams) and its street value (approximately $3000) were consistent with distribution, not personal use. *Id.* at 235, 242-247.

---

[2] Before trial, the district court granted petitioner's motion to sever Counts 4 and 5, which charged him with lying under oath about his assets in order to obtain legal representation at public expense. After the trial, the district court granted the government's motion to dismiss Counts 4 and 5. See Superseding Indictment 2-4, Gov't C.A. Br. 2 & n.1.

Petitioner did not testify, and he presented no witnesses or other evidence suggesting that the drugs were for personal use. *Id.* at 342-352.

At the charge conference, petitioner requested that the district court instruct the jury on the lesser-included offense of simple possession of cocaine, in violation of 21 U.S.C. 844. Petitioner's counsel argued that although such an instruction was not "mandated" under Eleventh Circuit precedent, it was nonetheless "appropriate" given the facts of the case. 5/17/06 Tr. 368-369. The district court declined to give the requested instruction on the ground that the record contained no evidence suggesting that "this was for personal use as opposed to being distributed to others." *Id.* at 373.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-4a. As relevant here, the court declined to consider petitioner's argument that the district court erroneously denied his request for a jury instruction on the lesser-included offense of simple possession of cocaine. The court concluded that petitioner had forfeited that argument by raising it for the first time in his reply brief, noting that "[u]nder the law of this Circuit, an issue not raised in a party's initial appellate brief is considered waived, and the party is prohibited from raising the issue later in the appeal." Pet. App. 3a (quoting *United States* v. *Silvestri*, 409 F.3d 1311, 1338 n.18 (11th Cir.), cert. denied, 546 U.S. 1048 (2005)).

The court also rejected petitioner's argument that insufficient evidence supported his conviction for carrying a firearm "during and in relation to" a drug trafficking offense, concluding that "[t]he evidence suggested that the firearm at least had 'the potential of facilitating' the drug trafficking offense because it was loaded, close

to the cocaine, and readily accessible to [petitioner]." Pet. App. 2a-3a (quoting *United States* v. *Timmons*, 283 F.3d 1246, 1251 (11th Cir.), cert. denied, 537 U.S. 1004 (2002)).

The court of appeals rejected each of petitioner's sentencing claims. The court concluded that the trial court did not err in denying petitioner a two-level reduction in his Guidelines offense level for acceptance of responsibility "because [petitioner] put the government to its burden of proof both before and during trial." Pet. App. 3a (citing Sentencing Guidelines § 3E1.1 comment. (n.2); and *United States* v. *Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc)). Next, the court found that the district court was correct to classify petitioner as a career offender because his two prior offenses (which occurred in January 1995 and April 1995) were separated by an intervening arrest and thus counted as "unrelated" under Sentencing Guidelines § 4A1.2 comment. (n.2). Pet. App. 4a. The court further concluded that petitioner's 360-month sentence of imprisonment was reasonable, noting that "[t]he district court considered permissible sentencing factors, stated its reasons for the particular sentence on the record, and sentenced [petitioner] at the low end of the Guidelines range." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-12) that the district court erred in refusing to instruct the jury on the lesser-included offense of simple possession of cocaine. See 21 U.S.C. 844(a). That argument does not warrant this Court's review.

a. As an initial matter, the court of appeals declined to reach petitioner's claim that he was entitled to a lesser-included offense instruction, concluding that he

had forfeited that claim by failing to develop it in his opening brief on appeal. Pet. App. 3a. Petitioner does not challenge this conclusion, stating that he "made a brief mention of the issue in his initial brief under issue two, but concedes that there was no further expansion of this particular argument in the brief." Pet. 11. Nor does he contend that there is any conflict of authority on whether an issue not addressed in an appellant's opening brief can be deemed forfeited. In fact, other courts of appeals routinely invoke the rule applied here. See, *e.g.*, *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990); *Cinel* v. *Connick*, 15 F.3d 1338, 1345 (5th Cir.), cert. denied, 513 U.S. 868 (1994); see also *United States* v. *Elder*, 90 F.3d 1110, 1118 (6th Cir.), cert. denied, 519 U.S. 1016, and 519 U.S. 1131 (1996).

Instead, petitioner argues that the lower court's application of this forfeiture rule denied him "due process" because the district court error "severely impaired [his] sole theory of defense, and thus the failure of the appellate court to address this issue on appeal is tantamount to not allowing [p]etitioner to appeal." Pet. 10. Contrary to petitioner's suggestion, he was not denied appellate review; the court of appeals considered (and rejected) several other challenges to his conviction and sentence. See Pet. App. 1a-2a (listing issues presented on appeal). In any event, as the Court has observed in other contexts, "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); see *Thomas* v. *Arn*, 474 U.S. 140, 155 (1985) (due process not violated by procedural rule conditioning the right to

appellate review of Magistrate Judge's report on the filing of objections).

b. Petitioner's factbound claim would not merit review even if the court of appeals had addressed it. A defendant is entitled to a jury instruction on a lesser-included offense only if the evidence is such that "a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck* v. *United States*, 489 U.S. 705, 716 n.8 (1989); see *Keeble* v. *United States*, 412 U.S. 205, 208 (1973). In this case, the jury could not have rationally concluded that the drugs at issue were merely for personal use given that petitioner possessed a large quantity of drugs packaged in small baggies for resale, while simultaneously possessing $228 in a "dealer's fold," scales, cutting agent, unused empty baggies, and a loaded gun. See, *e.g.*, *United States* v. *Upton*, 512 F.3d 394, 403 (7th Cir.) (even though quantity of drugs seized was relatively small, simple possession instruction not warranted in light of other evidence demonstrating the defendant had a retail drug operation), petition for cert. pending on other grounds, No. 07-10234 (filed Mar. 31, 2008); cf. *United States* v. *Hernandez*, 476 F.3d 791, 799-800 (9th Cir.) (holding that lesser-included offense instruction should have been given where "the drugs were not individually cut or packaged for sale," and "the government produced no evidence that [the defendant] had precursor chemicals, glassware, cutting agents, scales, firearms or weapons, or other typical items associated with drug trafficking"), cert. denied, 128 S. Ct. 265 (2007).

2. Petitioner also renews his claim that the evidence was insufficient to support his conviction under 18 U.S.C. 924(c)(1)(A) for "carry[ing]" a firearm "during and in relation to" a drug trafficking offense. Pet. 4-5.

That statute imposes criminal liability on "any person who, during and in relation to any * * * drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). Petitioner does not deny that he carried a gun during a drug trafficking offense. Instead, he contends that the evidence did not permit the jury to conclude that he carried a firearm "in relation to" his drug trafficking. Pet. 5.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court noted that "[t]he phrase 'in relation to' is expansive." *Id.* at 237. The Court explained that the phrase in Section 924(c)(1), "at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Id.* at 237-238. "Instead, the gun at least must 'facilitat[e], or ha[ve] the potential of facilitating,' the drug trafficking offense." *Id.* at 238 (brackets in original) (quoting *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985)).

In this case, petitioner was arrested with a loaded semi-automatic firearm tucked in his waistband while driving a car containing multiple small baggies of cocaine packaged for sale and small bills arranged in a "dealer's fold." 5/16/08 Tr. 155-156, 167-176. The government also presented expert testimony that drug dealers are often the victims of robberies and thus frequently keep firearms close by to protect themselves and their drugs, 5/17/08 Tr. 247, and that the type of firearm (and ammunition) at issue was known as a self-defense weapon because it was easy to conceal and very accurate. *Id.* at 308, 312. Given that evidence, the jury could infer that petitioner carried a concealed and

loaded weapon on his person in order to facilitate his drug trafficking. Other courts of appeals have found sufficient evidence of a Section 924(c)(1) violation on similar facts, and petitioner cites no contrary authority. See, *e.g.*, *United States* v. *Harris*, 477 F.3d 241, 244-245 (5th Cir.), cert. denied, 127 S. Ct. 2117 (2007); *United States* v. *Jackson*, 300 F.3d 740, 747-748 (7th Cir. 2002); *United States* v. *Gibbs*, 182 F.3d 408, 425 (6th Cir.), cert. denied, 528 U.S. 1051 (1999); *United States* v. *Williams*, 104 F.3d 213, 215 (8th Cir. 1997); *United States* v. *Barnhardt*, 93 F.3d 706, 710-711 (10th Cir. 1996).

Petitioner's reliance on *Bailey* v. *United States*, 516 U.S. 137 (1995), is misplaced. Petitioner cites *Bailey* for the proposition that "to sustain a conviction under * * * § 924(c)(1), the government must prove that the defendant actively employed the firearm during and in relation to the predicate crime." Pet. 5. But the "active employment" holding in *Bailey* defined the word "use" in Section 924(c)(1), not the word "carry" or the phrase "in relation to." See *Bailey*, 516 U.S. at 138-139. Likewise, in *Watson* v. *United States*, 128 S. Ct. 579 (2007), this Court addressed the scope of the word "use." See *id.* at 586 (holding that "a person does not 'use' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs"). Neither *Bailey* nor *Watson* calls into question the holding of the court of appeals in this case, which concerns the "carry" prong of Section 924(c)(1)(A) and its "in relation to" requirement. Under this Court's decisions, petitioner, who had the firearm tucked in his waistband, was unquestionably carrying the firearm. *Muscarello* v. *United States*, 524 U.S. 125, 130 (1998) ("No one doubts that one who bears arms on his person 'carries a weapon.'"). And, as noted, the evidence sup-

ported the conclusion that the firearm facilitated the drug trafficking offense.

3. Petitioner contends (Pet. 12-14) that the district court clearly erred at sentencing in denying him a two-level reduction for acceptance of responsibility under Guidelines § 3E1.1. To receive an adjustment under Section 3E1.1, a defendant must "demonstrate [] acceptance of responsibility for his offense" by "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." Sentencing Guidelines § 3E1.1(a) & comment. (n.1(a)). An application note to Section 3E1.1 states: "This adjustment is not intended to apply to a defendant who puts the Government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.* § 3E1.1 comment. (n.2).

Petitioner was not entitled to an adjustment for acceptance of responsibility. Although petitioner went to trial, he now claims that "it was undisputed that [petitioner] stipulated to the possession of the cocaine and the firearm and to being a convicted felon and only disputed his intent at trial." Pet. 14. That is not so. Petitioner did not stipulate to the possession of the cocaine or the firearm, and indeed suggested through cross-examination and in his closing argument that Deputy Morgado was lying about the circumstances of his arrest. 5/17/08 Tr. 391-406; see also *id.* at 391 (Petitioner's counsel arguing in closing that "[t]he question becomes if you believe what [Deputy] Morgado had to say and whether or not it was reasonable?"); *id.* at 409-410 (government responding in rebuttal to apparent suggestion

that Deputy Morgado has "manufactur[ed] this whole case"). Thus, the district court correctly concluded at petitioner's sentencing hearing that "[petitioner] * * * exercised his constitutional right to trial by jury, and he required the Government to prove every element of the case * * * with the exception of the fact that he was a convicted felon." 7/28/06 Tr. 48. Accordingly, petitioner's factbound challenge to the district court's decision not to reduce his Sentencing Guidelines' range for acceptance of responsibility does not merit further review.[3]

4. Finally, petitioner contends (Pet. 14-17) that the district court abused its discretion in not sentencing him below the advisory Guidelines range for his offense. See Pet. 16 (sentence of 360 months of imprisonment was "clearly unreasonable and overly excessive"); 7/31/06 Tr. 19 (district court concluding that "the Guidelines imprisonment range is a range of 360 months to life imprisonment"). In support of that claim, petitioner notes that his two prior felony convictions (which resulted in his "career offender" status) were in 1995, and he claims that he had made "progress" in "his family life, raising his children and employment," and that, at the time of these offenses, he was addicted to cocaine as a result of a car accident. Pet. 15.

---

[3] Petitioner cites (Pet. 12) federal appellate decisions for the proposition that a defendant may demonstrate acceptance of responsibility if he goes to trial to preserve issues unrelated to factual guilt. See Sentencing Guidelines § 3E1.1 comment. (n.2) (noting that reduction for acceptance of responsibility may be available in "rare situations" where a defendant goes to trial, for example, "to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." Those authorities are irrelevant here, however, because petitioner contested his factual guilt at trial.

Petitioner made all of these arguments at a lengthy sentencing hearing, and the district court carefully considered them. See 7/28/06 Tr. 1-91; 7/31/06 Tr. 1-59. Nonetheless, noting the similarity between petitioner's 1995 arrest for carrying a concealed weapon and the offenses at issue here, the district court concluded that petitioner's criminal history category did not overstate his record. *Id.* at Tr. 17 (concluding, based on similarity in present and earlier offenses, that petitioner "has been an armed drug dealer for a long time"); see *id.* at 49 (prior offense "seems to be almost the mirror image of the crime for which [petitioner] is in court today"). In addition, the court rejected petitioner's claim that his convictions were the result of his car accident, concluding instead that petitioner "is a drug dealer who got into an accident." *Id.* at 52. Petitioner faults the court of appeals for failing to reweigh the relevant considerations and substitute its judgment for that of the district court, Pet. 16, but that was not the proper role for the appellate court. *Gall* v. *United States*, 128 S. Ct. 586, 597 (2007). The court of appeals correctly determined that petitioner's sentence was "reasonable," and petitioner identifies no reason for this Court to review this factbound determination.[4]

---

[4] Although petitioner does not challenge his career-offender status on this ground, the government notes that the district court predicated that status on a prior conviction for carrying a concealed weapon. 07/31/06 Tr. 49-50. On April 21, 2008, this Court granted a writ of certiorari and vacated the judgment in *Archer* v. *United States*, No. 07-8394, which presented the question whether carrying a concealed firearm qualifies as a "crime of violence" under Sentencing Guidelines § 4B1.2, and remanded the case to the Eleventh Circuit for consideration in light of *Begay* v. *United States*, No. 06-11543 (Apr. 16, 2008). There is no need for similar action here, because petitioner did not present any such claim on appeal; indeed, he acknowledged in his appellate

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

APRIL 2008

---

reply brief that "these two felonies [including the concealed-weapon offense] are 'crimes of violence' for purposes of the Guidelines." Pet. Reply Br. 12. Under such circumstances, the Eleventh Circuit would deem forfeited any claim that the concealed-weapon offense was not a "crime of violence." See, *e.g.*, *United States* v. *Levy*, 416 F.3d 1273, 1276-1280 (11th Cir.) (per curiam) (refusing, on remand from this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), to address a *Booker* claim because it had not been presented in the initial appellate brief), cert. denied, 546 U.S. 1011 (2005).

81

(2)

No. 07-873

FILED
JAN 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ROBERTO DELGADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

---

SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

MICHAEL SALNICK, ESQ. *
SALNICK, FUCHS, & BERTISCH, P.A.
One Clearlake Centre, Ste 1203
250 S. Australian Avenue
West Palm Beach, FL 33401
(561) 471-1000

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

No. 07-873

ROBERTO DELGADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL BRIEF CALLING ATTENTION TO A NEW ELEVENTH CIRCUIT CASE RELEVANT TO ISSUE THREE IN PETITION

Whether the trial court imposed a reasonable sentence upon Petitioner?

CITATION OF CASE BELOW

The opinion of the court of appeals is unreported, but may be found at *Delgado v. United States*, 2007 WL 2859806 (11th Cir. Oct. 3, 2007).

STYLE OF CASE

The Eleventh Circuit Court of Appeals rendered its decision on October 2, 2007. A petition for rehearing

was denied on November 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition seeking a writ of certiorari was filed on December 28, 2007, and the government filed its waiver of its right to file a response on January 8, 2008.

STATEMENT OF THE CASE

SETTING FORTH RELEVANT FACTS

Petitioner Robert Delgado is incarcerated on this case and is serving a thirty (30) year sentence. Mr. Delgado was convicted by a jury of count 1 possession of a firearm by a convicted felon (in violation of 18 U.S.C. §922(g)(1)); count 2 possession of cocaine with intent to distribute (in violation of 21 U.S.C. §841(a)(1)); and count 3 carrying a firearm during and in relation to a drug trafficking crime (in violation of 18 U.S.C. §924(c)(1)(A)(i)) (Doe 81- pg 1). The district court fashioned a prison term of 30 years by imposing 10 years for count 1 and 15 years tar count 2 and 5 years for count 3; all sentences to be served consecutively (Doe 90- pgs 1-3). The district court also refused to award Petitioner the reduction for acceptance of responsibility because Mr. Delgado exercised his constitutional right for a jury trial.

On January 14, 2008, the Eleventh Circuit Court of Appeals rendered an opinion in *United States v. Dorsey*, --F.3d--, 2008 WL 115428 (11th Cir. 2008) (attached), and addressed an issue of apparent first impression for the eleventh circuit. The defendants appealed their convictions and sentences for drug conspiracy and drug distribution charges after a jury trial. Mr. Dorsey's argument on appeal was that the government punished him for exercising his Sixth Amendment right to a jury trial by refusing to file a section 5K1.1 motion. A section 5K1.1 motion allows

for the district court to reduce the defendant's sentence based on the defendant's substantial assistance to law enforcement or other governmental entity. *See Dorsey*, 2008 WL 115428 at pg.2; *see also* USSG §5 K1.1.

The *Dorsey* court acknowledged that this Honorable Court has previously held that district courts may grant a remedy to defendants where the prosecutor's refusal to the a substantial assistance motion was based on an unconstitutional motive, such as race or religion. *See Dorsey*, 2008 WL 115428 at pg.2. The Eleventh Circuit specifically held that refusing to file a section 5K1.1 motion in retribution for exercising the Sixth Amendment right to trial by jury is an unconstitutional motive: "While the government may refuse to file a §5K1.1 for many reasons, and it is within the government's discretion to do so, 'to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort'". *Id* (*quoting Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) and *citing Wade v. United States*, 504 U.S. 181, 185 (1992)).

In applying *Dorsey* to the instant case, Petitioner argues that the district court similarly violated his due process rights when it refused to grant him the acceptance of responsibility reduction because Petitioner exercises his right to a. trial by jury. In this case, Mr. Delgado went to trial to dispute the intent element of the cocaine possession (with intent to traffick), but not the actual possession of the cocaine itself, and to dispute the allegation that the firearm he possessed was possessed in furtherance of drug trafficking, but not the actual possession of the firearm itself (R3-97- 329).

In the instant case, the trial court refused to award the two point reduction, specifically because Mr. Delgado exercised his right to a trial by jury case (R1- 99- 48). The trial court noted that Mr. Delgado litigated the case "very carefully and properly" including a pretrial evidentiary hearing on its motion to suppress evidence, and therefore, should not be awarded an acceptance of responsibility reduction (R 99- 48, 49).

The district court violated Mr. Delgado's due process rights where it refused to acknowledge that Petitioner had accepted responsibility for his conduct, and most importantly, at trial, Mr. Delgado stipulated that he was a convicted felon (R3-97-313), did not dispute that he possessed the firearm (R3- 97-300), and did not dispute that he possessed the cocaine (R3-97322).

Respectfully submitted,

MICHAEL SALNICK, ESQ. *
SALNICK, FUCHS, & BERTISCH, P.A.
One Clearlake Centre, Ste 1203
250 S. Australian Avenue
West Palm Beach, FL 33401
(561) 471-1000

* Counsel of Record

Counsel for Petitioner

January 22nd, 2008

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 06-16698
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES DORSEY, a.k.a. Mountain Man,
SANDRA AVERY, a.k.a. Sandra Dorsey,
Defendants-Appellants.

Jan. 14, 2008

Before TJOFLAT, BIRCH and WILSON, *Circuit Judge.*

WILSON, *Circuit Judge*:

Upon *sua sponte* reconsideration of this appeal, we vacate our prior opinion and substitute the following in its place.

James Dorsey ("Dorsey") and Sandra Avery ("Avery") appeal their convictions for drug conspiracy and drug distribution charges after a jury trial. They both contend that pretrial motions to suppress evidence seized from their residence and introduced at their trial should have been granted because the affidavits supporting the search warrants contained false statements and lacked probable cause. After careful review, we find that there was sufficient corroborating information in the affidavits to support

a finding of probable cause, and affirm their convictions without further discussion.

Dorsey also appeals his sentence. He argues that the government refused to file a motion to reduce his sentence pursuant to United States Sentencing Guideline § 5K1.1 to punish him for exercising his Sixth Amendment right to a jury trial, thereby denying him due process of law. We have not previously considered whether the government's refusal to file a § 5K1.1 motion because the defendant exercised his right to a jury trial constitutes an unconstitutional motive. We now hold that it does, but we are unable to determine whether that is what took place in this case because of insufficient fact-finding at the district court. Therefore, we vacate Dorsey's sentence and remand this case for a new sentencing hearing.[1]

BACKGROUND

At sentencing, the district court determined that Dorsey's advisory Guidelines range was 168 to 210 months. Dorsey then moved the court to compel the government to file a motion pursuant to U.S.S.G § 5K1.1, because after his arrest he immediately cooperated with the police. After his arrest, Dorsey called his drug supplier, Steve Washington, and left a voice message and the return telephone number of a detective with the Sarasota Police Department on Washington's cellular phone. The next morning, the detective spoke to Washington and arranged to purchase a quarter kilogram of cocaine. When Washington arrived to deliver the cocaine, the authorities arrested him and seized the cocaine.

---

[1] Dorsey also argues that his sentence was otherwise unreasonable. Since we vacate the sentence and remand for resentencing, we need not reach this claim.

Dorsey asserted that the government had earlier informed him that he could earn a § 5K1.1 departure because of his cooperation if he pled guilty. Once he decided to go to trial, the government did not file a § 5K1.1 motion. Dorsey argued that this constituted an impermissible exercise of the government's discretion in refusing to file a § 5K1.1 motion. The government responded that it had never told Dorsey that he had earned a § 5K1.1, departure; rather, he was told that the circumstances surrounding the minimal amount of cooperation that he provided would be considered if he cooperated fully and completely. At sentencing, the government stated that Dorsey "chose not to continue with cooperation. He chose to go to trial." Dorsey responded that irrespective of whether his cooperation was minimal or not, it was obvious that his cooperation was complete, and the government's refusal to move for a § 5K1.1 departure based on his decision to go to trial was an unconstitutional motive. Without explanation, the district court denied Dorsey's motion.

DISCUSSION

We review *de novo* whether the district cowl has the authority to depart downward from the guideline range under § 5K1.1 in the absence of a motion by the government. *See United States v. Forney*, 9 F.3d 1492, 1498 (11th Cir.1993).

Section § 5K1.1 of the Sentencing Guidelines provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1. We have stated that the government has "'a power, not a duty, to file a motion when a defendant has substan-

tially assisted.'" *Forney*, 9 F.3d at 1500 (quoting *Wade v. United States*, 504 U.S. 181, 185, 112 S.Ct. 1840, 1843, 118 L.Ed.2d 524 (1992)). Therefore, a district court cannot grant a downward departure for substantial assistance absent a motion by the government. *Id.* at 1501. However, the United States Supreme Court held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," like "race or religion." *Wade*, 504 U.S. at 185-86, 112 S.Ct. at 1843-44. A defendant who merely claims to have provided substantial assistance or who makes only generalized allegations of an improper motive is not entitled to a remedy or even to an evidentiary hearing. *Id.* at 186, 112 S.Ct. at 1844. Thus, judicial review is appropriate only "when there is an allegation and a substantial showing that the prosecution refused to file a substantial assistance motion because of a constitutionally impermissible motivation." *Forney*, 9 F.3d a 1502.

We have not previously decided whether the government's refusal to file a § 5K1.1 motion to punish a defendant for exercising his constitutional right to a jury trial is an unconstitutional motive under *Wade*, but the Third and Ninth Circuits have. They both held that refusing to file a § 5K1.1 to punish a defendant for exercising this right is an unconstitutional motive, and the Tenth Circuit has also said so, albeit in dicta. *United States v. Khoury*, 62 F.3d 1138, 1141 (9th Cir.1995); *United States v. Paramo*, 998 F.2d 1212, 1219-20 (3d Cir.1993); *United States v. Easter*, 981 F.2d 1549, 1555 (10th Cir.1992). While the government may refuse to file a § 5K1.1 for many reasons, and it is within the government's discretion

to do so, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). Accordingly, we agree with our sister circuits and hold that refusing to file a § 5K1.1 motion in retribution for exercising the Sixth Amendment right to a trial by jury is an unconstitutional motive under *Wade*.

The district court denied Dorsey's motion without explanation. Therefore, we cannot be certain that the district court believed that it had the authority to depart downward absent a motion by the government. Since we hold the district court has such authority, we vacate Dorsey's sentence and remand the case back to the district court to determine whether Dorsey can establish a "substantial showing" that the government's refusal to file a substantial assistance motion was based on an unconstitutional motive.

On remand, Dorsey has the burden of proving prosecutorial vindictiveness. We have found that "a superseding indictment adding new charges that increase the potential penalty would violate due process if the prosecutor obtained the new charges out of vindictiveness[, and] [v]indictiveness in this context means the desire to punish a person for exercising his rights." *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir.2006) (citation omitted). The same reasoning applies to a prosecutorial decision not to file a § 5K1.1 motion. *See Paramo*, 998 F.2d at 1220 (finding that the defendant must prove prosecutorial vindictiveness in a refusal to file a § 5K1.1 claim); *see also United States v. Murphy*, 65 F.3d 758, 762 (9th Cir.1995) (same).

A defendant may establish vindictiveness by either showing facts that give rise to a presumption of vindictiveness or by offering evidence of a prosecutor's actual vindictiveness. *Paramo*, 998 F.2d at 1220. A presumption of vindictiveness "may operate in the absence of any proof of an improper motiv[e;]" therefore, the presumption only applies when the factual circumstances indicate a "reasonable likelihood of vindictiveness." *United States v. Goodwin*, 457 U.S. 368, 373, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982). If a defendant successfully establishes a reasonable likelihood of vindictiveness, the government can overcome the presumption with objective evidence justifying its conduct. *See id.* at 374, 102 S.Ct. at 2489. In this case, the government stated that it did not file a § 5K1.1 motion because Dorsey's assistance was not substantial and that he started dealing drugs again. Therefore, even if a presumption of vindictiveness could apply in this case, the government has proffered legitimate reasons for its failure to file a § 5K1.1 motion. Therefore, Dorsey will have to prove actual vindictiveness. *See Paramo*, 998 F.2d at 1221. "This showing is, of course, exceedingly difficult to make, *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987). To prove actual vindictiveness, Dorsey must present objective evidence that the government acted solely to punish him for exercising his legal rights, and that the reasons proffered by the government are pretextual. *Id.; Paramo*, 998 F.2d at 1221.

We leave these issues to the district court to decide after further fact-finding at a new sentencing hearing.

AFFIRMED IN PART, VACATED AND REMANDED IN PART,